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IN THE

SUPREME COURT OF THE STATE OF WASHINGTON

No. 26038

ERNEST PARRISH AND ELSIE PARRISH, HIS WIFE,
Appellants,

vs.

WEST COAST HOTEL COMPANY, A CORPORATION.
Respondent.

AMENDED STATEMENT AS TO JURISDICTION.

Pursuant to Rule 12, paragraph 1 of the Rules of the Supreme Court of the United States, appellant submits this statement showing that the appeal in the above entitled cause is properly within the jurisdiction of the Supreme Court of the United States.

Opinion Below.

The opinion of the Supreme Court of the State of Washington is reported at this time in the Advance Sheets of Washington Decisions, volume 85, No. 16, published at Olympia, Washington, on April 15, 1936, at page 517, being 85 Wash. Dec. 517. Said opinion was filed April 2, 1936 (R. 47). Petition for rehearing was filed by the appel-

lant within thirty days thereafter, to wit, April 26, 1936, and was denied on May 22, 1936 (R. 73). Judgment was entered on July 9, 1936 (R. 77). There is appended hereto as Exhibit "A", a copy of the oral decision of the Superior Court of Chelan County and as Exhibit "B" the opinion of the Supreme Court of the State of Washington being all of the opinions of the courts of the State considering the matter.

Jurisdiction.

The jurisdiction of the Supreme Court of the United States is invoked under section 237 (a) of the United States Judicial Code, as amended by the act of February 13, 1925, January 31, 1928, and April 26, 1928; Title 28 U. S. C. A., sec. 344 (a), 861 (a) and 861 (b).

1.

(*Appeal Timely Taken.*)

The judgment of the Supreme Court of the State of Washington sought to be reversed was entered on July 9, 1936 (R. 77). The time for taking the appeal began to run on the date of such judgment. (See *Puget Sound Power & Light Company* v. *King County,* 264 U. S. 22, where the time for appealing from the judgment of the Supreme Court of the State of Washington is considered). The petition for appeal, accompanied by assignment of errors and statement as to jurisdiction required by Rule 12 (1) of the Supreme Court of the United States, was on the 9th day of July, 1936, presented to the Hon. William J. Millard, Chief Justice of the Supreme Court of the State of Washington, and by him allowed on the date of the presentation of this petition (R. 93).

2.

(*Finalty of Judgment.*)

The judgment forming the basis of the appeal is a final judgment in the sense that it determines the controversy, leaving nothing to be done except the ministerial acts of enforcement. It is one denying the appellant any relief and entering a monetary judgment in favor of the appellees as against the appellant. The final court has entered a final judgment upon the merits (R. 77). The judgment appealed from is final within the meaning of section 237 of the Judicial Code.

Mower v. *Fletcher,* 114 U. S. 127;

Board of Commissioners of Tippecanoe County v. *Lucas, Treasurer,* 93 U. S. 108;

Gulf Refining Company v. *U. S.,* 296 U. S. 125.

3.

(*Judgment of the Highest Court.*)

The judgment of the Supreme Court of the State of Washington is that of the highest court in which, under the laws of the State, such judgment could be had. No further appeal may be had to it or any other court, save the Supreme Court of the United States since the appeal herein is taken from "a highest court of a State in which a decision on the suit could be had."

Constitution of the State of Washington, Article IV, sections 1, 4, and 6, as found in Remington's Revised Statutes of the State of Washington, 1932, volume 1, pages 422, 425, and 428, respectively.

Remington's Revised Statutes of the State of Washington, 1932, volume 4, section 1716, pages 10 and 11; Laws of 1893, page 119; Laws of 1901, page 28, section 1; section 1737, page 72, Laws of 1889, page 130, section 22; section

1740, pages 74 and 75, Laws of 1893, page 131, section 25; and section 1741, page 75, Laws of 1893, page 131, section 26.

4.

(Validity of a State Statute Drawn Into Question and Decision in Favor of Its Validity.)

In this suit the petitioner contended in the court below that a State statute, as applied to the petitioner, was repugnant to and in conflict with section 1, Article XIV of the Constitution of the United States, which states: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any persons within its jurisdiction equal protection of the laws." The decision of said Supreme Court of the State of Washington was in favor of the validity of the statute.

(a) Statute.

The statute, the validity of which was drawn into question is Chapter 174, Laws of 1913, page 602, being section 7623, *et seq.*, of Remington's Revised Statutes of Washington (1932, page 657). The pertinent parts of said chapter are as follows:

> "SECTION 1. The welfare of the State of Washington demands that women and minors be protected from conditions of labor which have a pernicious effect on their health and morals. The State of Washington, therefore, exercising herein its police and sovereign power declares that inadequate wages and unsanitary conditions of labor exert such pernicious effect.
>
> "SEC. 2. It shall be unlawful to employ women or minors in any industry or occupation within the State of Washington under conditions of labor detrimental to their health or morals; and it shall be unlawful to

employ women workers in any industry within the State of Washington at wages which are not adequate for their maintenance.

"SEC. 3. There is hereby created a commission to be known as the 'Industrial Welfare Commission' for the State of Washington, to establish such standards of wages and conditions of labor for women and minors employed within the State of Washington, as shall be held hereunder to be reasonable and not detrimental to health and morals, and which shall be sufficient for the decent maintenance of women."

* * * * * * *

Under Chapter 7, Laws of 1921, page 46, section 82, and page 68, section 134, being Remington's Revised Statutes (1932) Section 10840 and Section 10893 respectively the Industrial Welfare Commission was abolished and its duties assigned to the Industrial Welfare Committee, consisting of the Director of Labor and Industries, the Supervisor of Industrial Insurance, the Supervisor of Industrial Relations, the Industrial Statistician, and the Supervisor of Women in Industry.

"SEC. 6. It shall be the duty of the Commission to ascertain the wages and conditions of labor of women and minors in the various occupations, trades and industries in which said women and minors are employed in the State of Washington. * * *

* * * * * * *

"SEC. 9. The commission shall specify times to hold public hearings, at which times employers, employees or other interested persons may appear and give testimony as to the matter under consideration. The commission shall have power to subpoena witnesses and to administer oaths. * * *

"SEC. 10. If, after investigation, the commission shall find that in any occupation, trade or industry, the

wages paid to female employees are inadequate to supply them necessary cost of living and to maintain the workers in health, or that the conditions of labor are prejudicial to the health or morals of the workers, the commission is empowered to call a conference composed of an equal number of representatives of employers and employes in the occupation or industry in question, together with one or more disinterested persons representing the public; but the representatives of the public shall not exceed the number of representatives of either of the other parties; and a member of the commission shall be a member of such conference and chairman thereof. The commission shall make rules and regulations governing the selection of representatives and the mode of procedure of said conference, and shall exercise exclusive jurisdiction over all questions arising as to the validity of the procedure and of the recommendations of said conference. On request of the commission, it shall be the duty of the conference to recommend to the commission an estimate of the minimum wage adequate in the occupation or industry in question to supply the necessary cost of living, and maintain the workers in health, and to recommend standards of conditions or labor demanded for the health and morals of the employes. The findings and recommendations of the conference shall be made a matter of record for the use of the commission.

"SEC. 11. Upon the receipt of such recommendations from a conference, the commission shall review the same and may approve any or all of such recommendations, or it may disapprove any or all of them and recommit the subject or the recommendations disapproved of, to the same or a new conference. After such approval of the recommendations of a conference the commission shall issue an obligatory order to be effective in sixty (60) days from the date of said order, or if the commission shall find that unusual conditions necessitate a longer period, then it shall fix a later date, specifying the minimum wage for women in the occu-

pation affected, and the standard conditions of labor for said women; and after such order is effective, it shall be unlawful for any employer in said occupation to employ women over eighteen (18) years of age for less than the rate of wages, or under conditions of labor prohibited for women in said occupation. The commission shall send by mail so far as practicable to each employer in the occupation in question a copy of the order, and each employer shall be required to post a copy of said order in each room in which women affected by the order are employed. When such commission shall specify a minimum wage hereunder the same shall not be changed for one year from the date when such minimum wage is so fixed.

"SEC. 12. Whenever wages or standard conditions of labor have been made mandatory in any occupation, upon petition of either employers or employes, the commission may at its discretion reopen the question and re-convene the former conference or call a new one, and any recommendations made by such conference shall be dealt with in the same manner as the original recommendations of a conference.

"SEC. 13. For any occupation in which a minimum rate has been established, the commission through its secretary may issue to a woman physically defective or crippled by age or otherwise, or to any apprentice in such class of employment or occupation as usually requires to be learned by apprentices, a special license authorizing the employment of such licensee for a wage less than the legal minimum wage; and the commission shall fix the minimum wage for said person, such special license to be issued only in such cases as the commission may decide the same is applied for in good faith and that such license for apprentices shall be in force for such length of time as the said commission shall decide and determine is proper.

* * * * * * *

"SEC. 18. If any employe shall receive less than the legal minimum wage, except as hereinbefore provided

in section 13, said employe shall be entitled to recover in a civil action the full amount of the legal minimum wage as herein provided for, together with costs and attorney's fees to be fixed by the court, notwithstanding any agreement to work for such lesser wage. In such action, however, the employer shall be credited with any wages which have been paid upon account.

"SEC. 19. All questions of fact arising under this act shall be determined by the commission and there shall be no appeal from its decision upon said question of fact. Either employer or employe shall have the right of appeal to the superior court on questions of law.

* * * * * * *"

(b) **Application of Statute and Nature of the Case.**

In this suit the plaintiff and appellant below, Elsie Parrish, was employed by the defendant as a chamber maid in the hotel which it operates. Her husband was made a party in compliance with the community property laws existing in the State of Washington. The defendant was, at all times involved in the litigation, engaged in the operation of a hotel known as The Cascadian in the City of Wenatchee, Washington.

Mrs. Parrish had been employed as a chamber maid by the hotel company intermittently during a period beginning in August of 1933 and terminating in May, 1935. During the period of her employment Mrs. Parrish had been paid weekly a sum which was less than the $14.50 per week, which had been established by the Industrial Welfare Commission of the State of Washington for women employed in the hotel industry under the authority given to it by Chapter 174, Laws of 1913, page 602, Remington's Revised Statutes 1932, section 7623, *et seq.* Upon the termination of her employment Mrs. Parrish refused the check for $17.00 tendered by the hotel company and demanded the

difference between the wages she had been receiving and the wages she would have received under the minimum wage established by the Industrial Welfare Commission of Washington. This being refused she brought suit for this amount, expressly relying upon and citing the statute above referred to and the order promulgated by the Commission thereunder.

The hotel company, the petitioner here, answered, in effect, setting up a general denial of the indebtedness and affirmatively pleading that the minimum wage law and the ruling of the Commission thereunder were void under the limitations of section 1 of Article XIV of the Constitution of the United States.

Upon the case coming on for trial the Superior Court of the State of Washington for Chelan County ruled that the plaintiff, Mrs. Parrish, was entitled to judgment for $17.00, being the balance of wages owing to her, and that no further recovery could be had under the terms of Chapter 174, Laws of 1913, page 602, Remington's Revised Statutes 1932, section 7623, *et seq.*, for the reason that the statute was in conflict with section 1 of Article XIV of the Constitution of the United States, and was, therefore, void.

From this ruling the plaintiff, Mrs. Parrish, took an appeal to the Supreme Court of the State of Washington, wherein, in the opinion heretofore cited in this statement, the lower court was reversed upon the ground that the statute in question did not conflict with section 1 of Article XIV of the Constitution of the United States, and that, therefore, the plaintiff was entitled to judgment in accordance with the prayer of her complaint for the difference between the wages she had been paid and the amount she would have been paid under the minimum wage established by the Industrial Welfare Commission of the State of

Washington. It is from this decision that the petitioner seeks relief.

(c) **Constitutional Question Timely and Sufficiently Raised.**

The constitutionality of the statute was drawn into question by appropriate allegations in the answer of the petitioner, which expressly alleged as an affirmative defense that the statute was in conflict with section 1, Article XIV of the Constitution of the United States (R. 9) the express affirmative defense being as follows:

> "For a further separate and third affirmative defense defendant alleges that the act passed by the legislature of the State of Washington, known as Chapter 174 of the Laws of 1913, purporting to delegate to an Industrial Welfare Commission the power to establish and fix standards of wages for employees of various industries of this state, and particularly the wages to be paid employees of the housekeeping industry (hotels) is a violation of the constitutional rights of this defendant as guaranteed it under Article V and section 1 of Article XIV of the Constitution of the United States and sections 2 and 3 of Article I of the Constitution of the State of Washington."

At the close of the testimony the attorneys for the defendant, appellant here, made a motion to dismiss the case upon the express grounds set forth in the answer (R. 43). The Superior Court of Chelan County granted judgment to the defendant on this ground, the court stating in its decision as follows (R. 44):

> "If the law fixes a minimum wage, then I say she is entitled to her money. If that law is invalid then, of course, she is obligated to accept what she has received from time to time and paid her as full settlement for what she has done.
>
> "It seems to me that the decision of the highest court of the land (Adkins *v.* Children's Hosp., 261 U. S.

525) settles this question absolutely, and beyond all question, for the time being. I am not inclined to join the Kansas Court in saying that, but for the decision, I should like to do something else, because I do believe that it is in full accord with the principles on which our order is founded, that it is in accord with both the letter and the spirit of the Constitutions; so I believe the decision to be soundly right. Of course, it doesn't make any difference what this court thinks about it, nevertheless that is the view of the Court, not, as I say, joining the Kansas Court in apologizing for following the decision of the highest court of the land."

After the above oral decision was given the court made its findings of fact (R. 22) expressly finding as follows:

> "That the contention of the plaintiff that she should have been paid during all of said period at the rate of thirty-five cents per hour or $14.50 per week because of the existence of a so-called minimum wage scale for adult women as fixed by the Industrial Welfare Commission of the State of Washington, is unsound, is not sustained by the evidence and that any attempt to fix the minimum wage for adult women as prescribed by Chapter 174 of the Laws of 1913, and the acts of the Industrial Welfare Commission thereunder, are as to the defendant in this case a violation of its constitutional rights guaranteed it under Amendment V and section 1 of Amendment XIV of the Constitution of the United States."

The attorney for the respondents here (appellants below) filed a notice of appeal (R. 17) in accordance with the rules of practice and the statutes of the State of Washington, appealing to the Supreme Court of that state, in which notice it is recited:

> "Notice is hereby given that the plaintiffs, Elsie Parrish and Ernest Parrish, feeling aggrieved, do hereby appeal to the Supreme Court of the State of Washington from that certain judgment entered in the above entitled cause and court on the 9th day of No-

vember, 1935, and from each and every part thereof wherein and whereby it was adjudged that the minimum wage act, Chapter 174, Laws of 1913, of the State of Washington, and the acts of the Industrial Welfare Commission, so far as it attempts to fix the scale of wages for adult women, is in violation of the constitutional rights of the defendant guaranteed it under Amendment V, section 1 of Amendment XIV of the Constitution of the United States, and whereby the plaintiff was awarded the sum of only $17.00 and costs instead of the sum of $216.19 as claimed by the plaintiff."

The notice of appeal above was all that was necessary to bring the constitutional question before the Supreme Court of the State of Washington, and the Supreme Court thereupon gave its decision as shown by the appended copy thereof, and the only point discussed in that decision is the application of section 1, Article XIV of the Constitution of the United States, the same appearing in 85 Wash. Dec. 518. The court there in part stated as follows (R. 48):

"To recover that balance, plaintiff brought this action. The cause was tried to the court, which found that plaintiff was entitled to a recovery of seventeen dollars against defendant. The court further found that chapter 174, Laws of 1913, p. 602, in so far as it applies to adult women, is an unconstitutional interference with the freedom of contract included within the guaranties of the due process clause of the constitution of the United States.

"'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' Sec. 1, Amendment XIV, Federal Constitution.

"Judgment was entered accordingly. Plaintiff appealed."

The Supreme Court then proceeds to devote the whole opinion to a discussion of the application of section 1 of Article XIV of the Constitution of the United States to the statute in question, the same being the sole subject of appeal.

The opinion and judgment which the State Supreme Court rendered and entered could not have been rendered and entered without denying to petitioner all of the rights asserted by it under the constitutional privileges relied upon and said opinion and judgment cannot be rested upon any independent, non-Federal ground.

It is submitted that the judgment plainly and definitely draws in question the validity of the statute on the ground of its being repugnant to the constitution of the United States, as required by section 237 of the Judicial Code, as amended, and that this appeal comes within the proper jurisdiction of the Court.

Pacific Telephone and Telegraph Company v. *City of Seattle*, 291 U. S. 300;

Morehead v. *New York ex rel. Tipaldo*, — U. S. —, 80 L. Ed. Adv. Op. 921;

Home Insurance Company v. *Dick*, 281 U. S. 397;

Millsap College v. *City of Jackson*, 275 U. S. 129;

Meyer v. *Nebraska*, 262 U. S. 399;

Fairmont Creamery Company v. *Minnesota*, 274 U. S. 1.

The Question Submitted is a Substantial One.

The question which is before the Court here is the right of the State of Washington to establish by law a minimum wage below which the appellant and the respondent cannot freely contract, the contracting respondent being an adult woman. The question is, therefore, a very substantial one, and the right of the appellant which it seeks to protect is the extremely substantial right of freely entering into con-

tracts with its employees for their services and if the State is entitled to deprive the appellant of this right it suffers substantial damage and irreparable harm.

The express question here submitted has been considered by the Supreme Court in the following four cases, which pass upon expressly similar statutes of other States or of the Federal Government:

Morehead v. *New York ex rel. Tipaldo*, — U. S. —, 80 L. Ed. Adv. Op. 921;

Adkins v. *Children's Hospital*, 261 U. S. 525;

John W. Murphy, Attorney General of the State of Arizona, et al., Appellants, v. *A. Sardell*, 269 U. S. 530;

W. H. Donhan, as Prosecuting Attorney for the Sixth Judicial Circuit of the State of Arkansas, et al., Appellants, v. *West Nelson Manufacturing Company*, 273 U. S. 657.

Dated this 22nd day of August, 1936.

JOHN W. ROBERTS,
CROLLARD & O'CONNOR,
ROBERTS & SKEEL,
Attorneys for Petitioner.

Address: 914 Insurance Bldg. Seattle, Washington.

EXHIBIT "A".

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR CHELAN COUNTY.

ERNEST PARRISH, *et ux., Plaintiffs,*

vs.

WEST COAST HOTEL COMPANY, *a Corporation, Defendant.*

No. 12,215

Court's Memo Decision.

Hon. W. O. PARR, *Judge:*

Well, we will suppose this: Suppose that these two cases (Stettler *v.* O'Hara, 69 Ore. 519, and Simpson *v.* O'Hara, 70 Ore. 261) did decide, definitely, that the law was constitutional, and that the United States Court had at that time affirmed it, and wrote an opinion, affirming it; and then suppose, later, exactly the same question comes before them, and they arrive at a contrary conclusion. What would be the law?

In other words, the latest pronouncement of the highest court of the land is the law of the land, until it is reversed, as I understand it; and, even though the court in this State has reached a conclusion that the law is constitutional, if the court of the United States has reached a different conclusion that, of course, disposes of the matter.

There can be, in my judgment, no doubt about the similarity between the cases decided by the United States Supreme Court and this case. They are almost exactly on all fours. They held, specifically, that it is unconstitutional to fix, by law, a wage scale for adult persons. One of the members of our own court, in the very recent decision, and the one cited by Mr. Crollard there, specifically made the same statement. That was made subsequent to the United States decision. He used it to illustrate one of the things

which the Legislature could not do; that is, fix a wage for adult persons—anyone.

Now this case, in my judgment, raises the constitutional question. If the law is valid, then I'd say she has the money coming. If the law isn't valid, she doesn't have. There could be no doubt about the fact that her wages were paid her by the hotel company, on the theory that they were paying her all she had coming, and there is no doubt she was so paid, even though she had in her mind that she might have recovered the amount the statute provided. That doesn't change the fact. She received it without complaint, as payment for the work she was doing, which would constitute a binding contract, if such contract could be made.

If the law fixes a minimum wage, then I say she is entitled to her money. If that law is invalid then, of course, she is obliged to accept what she has received from time to time, and paid her as full settlement for what she has done.

It seems to me that the decision of the highest court of the land (Adkins *v.* Children's Hospital, 261 U. S. 525) settles this question absolutely, and beyond all question, for the time being. I am not inclined to join the Kansas Court in saying that, but for the decision, I should like to do something else, because I do believe that it is in full accord with the principles on which our order is founded; that it is in accord with both the letter and the spirit of the Constitution; so I believe the decision to be soundly right. Of course, it doesn't make any difference what this court thinks about it, nevertheless that is the view of the Court, not, as I say, joining the Kansas Court in apologizing for following the decision of the highest court of the land.

I appreciate that this matter is of considerable importance, but it seems to me that it was decided quite a while before this case was started, and in a manner that absolutely controls and binds this court, and all courts of the land.

The plaintiffs' action will be dismissed.

Mr. Conner: Exception.
Judge Parr: Exception noted.

EXHIBIT "B".

IN THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 26038.

Department 2.

April 2, 1936.

ERNEST PARRISH *and* ELSIE PARRISH, *His Wife, Appellants,*

vs.

WEST COAST HOTEL COMPANY, *a Corporation, Respondent.*

Appeal from a judgment of the Superior Court for Chelan County, Parr, J., entered November 9, 1935, upon findings in favor of the defendant, in an action for services, tried to the court. Reversed.

C. B. CONNER, for appellant.
CROLLARD & O'CONNER, for respondent.

MILLARD, *C. J.:*

Mindful of the duty of the state to protect women and minors from conditions of labor which have a pernicious effect on their health and morals, the legislature enacted chapter 174, Laws of 1913, p. 602, Rem. Rev. Stat., Sec. 7623 (P. C. Sec. 3526), et seq. The provisions of the act pertinent to this appeal are as follows:

> "SECTION 1. The welfare of the State of Washington demands that women and minors be protected from conditions of labor which have a pernicious effect on their health and morals. The state of Washington, therefore, exercising herein its police and sovereign power declares that inadequate wages and unsanitary conditions of labor exert such pernicious effect." Rem. Rev. Stat., Sec. 7623.
>
> "SECTION 2. It shall be unlawful to employ women or minors in any industry or occupation within the

state of Washington under conditions of labor detrimental to their health or morals; and it shall be unlawful to employ women workers in any industry within the state of Washington at wages which are not adequate for their maintenance." Rem. Rev. Stat. Sec. 7624.

"SECTION 3. There is hereby created a commission to be known as the 'Industrial Welfare Commission' for the state of Washington, to establish such standards of wages and conditions of labor for women and minors employed within the state of Washington, as shall be held hereunder to be reasonable and not detrimental to health and morals, and which shall be sufficient for the decent maintenance of women." Rem. Rev. Stat. Sec. 7624½.

From August, 1933 to May, 1935, when she was discharged, plaintiff was in the employ of defendant hotel corporation as a chambermaid at an agreed wage which was less than the minimum weekly wage of fourteen dollars and fifty cents as fixed by the Industrial Welfare Commission under Sec. 3, chapter 174, Laws of 1913, p. 602, Rem. Rev. Stat., Sec. 7624½. If payable at the agreed wage, defendant owes plaintiff a balance of seventeen dollars. If entitled to payment at the minimum rate established by the Industrial Welfare Commission, a balance of $216.19 is due to the plaintiff.

To recover that balance, plaintiff brought this action. The cause was tried to the court, which found that plaintiff was entitled to a recovery of seventeen dollars against defendant. The court further found that chapter 174, Laws of 1913, p. 602, in so far as it applies to adult women, is an unconstitutional interference with the freedom of contract included within the guaranties of the due process clause of the constitution of the United States.

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of

law, nor deny to any person within its jurisdiction the equal protection of the laws." Sec. 1, Amendment XIV, Federal Constitution.

Judgment was entered accordingly. Plaintiff appealed.

(1, 2) In *Larsen* v. *Rice*, 100 Wash. 642, 171 Pac. 1037, we held that the minimum wage law (chapter 174, Laws of 1913, p. 602), for women was constitutional. We said:

"It is undoubtedly a general rule that private controversies between individuals sui juris may be compromised by them by mutual agreement, and that the courts will not, where no question of fraud intervenes, relieve from the agreement, even though it be shown that the one gained rights thereby to which he would not otherwise have been entitled and that the other gave up rights to which he was fully entitled; this, on the principle that compromises are favored by the law, since they tend to prevent strife and conduce to peace and to the general welfare of the community. But the controversy here had an added element not found in the ordinary controversy between individuals. It was not wholly of private concern. It was affected with a public interest. The state, having declared that a minimum wage of a certain amount is necessary to a decent maintenance of an employee engaged in the employment in which the respondent was engaged, has an interest in seeing that the fixed compensation is actually paid. The statute making the declaration not only makes contracts of employment for less than the minimum wage void, but has sought to secure its enforcement by making it a penal offense on the part of the employer to pay less than the minimum wage, and by giving to the employee a right of action to recover the difference between the wage actually paid and such minimum wage. The statute was not, therefore, intended solely for the benefit of the individual wage earner. It was believed that the welfare of the public requires that wage earners receive a wage sufficient for their decent maintenance. The statute being thus protective of the public as well as of the wage earner,

> it must follow that any contract of settlement of a controversy arising out of a failure to pay the fixed minimum wage in which the state did not participate is voidable, if not void. Especially must this be so, as here, where the contract of settlement is executory, has been repudiated by one of the parties, the parties can be placed in statu quo, and the wage earner, by carrying out the contract, will not receive the wage to which she is justly entitled."

The Oregon minimum wage law for women—in all essentials the same as our law—was sustained in *Stettler* v. *O'Hara*, 69 Ore. 519, 139 Pac. 743, L. R. A. 1917C 944, Ann. Cas. 1916A 217; and *Simpson* v. *O'Hara*, 70 Ore. 261, 141 Pac. 158. These two cases were affirmed without an opinion by an equally divided court in *Stettler* v. *O'Hara*, 243 U. S. 629, 37 S. Ct. 475, Mr. Justice Brandeis taking no part in the consideration and decision of the cases.

In *Bunting* v. *Oregon*, 243 U. S. 426, 37 S. Ct. 435, Ann. Cas. 1918A 1043, the United States supreme court sustained a wage-fixing statute. The statute limited the hours of labor of any person, whether man or woman, working in any mill, factory or manufacturing establishment, to ten hours a day, with a proviso requiring such employees, if they worked more than ten hours a day, to accept for the three additional hours permitted not less than fifty per cent more than their usual wage.

By act of September 19, 1918 (40 Stat. 960, c. 174), Congress provided for the fixing of minimum wages for women and children in the District of Columbia. The statute was declared unconstitutional on the ground that it authorizes an unconstitutional interference with the freedom of contract included within the guaranties of the due process clause of the fifth amendment of the constitution of the United States. *Adkins* v. *Children's Hospital*, 261 U. S. 525, 43 S. Ct. 394, 24 A. L. R. 1238. Mr. Chief Justice Taft, dissenting, said:

> "The boundary of the police power beyond which its exercise becomes an invasion of the guaranty of liberty under the Fifth and Fourteenth Amendments

to the Constitution is not easy to mark. Our Court has been laboriously engaged in pricking out a line in successive cases. We must be careful, it seems to me, to follow that line as well as we can and not to depart from it by suggesting a distinction that is formal rather than real.

"Legislatures in limiting freedom of contract between employee and employer by a minimum wage proceed on the assumption that employees, in the class receiving least pay, are not upon a full level of equality of choice with their employer and in their necessitous circumstances are prone to accept pretty much anything that is offered. They are peculiarly subject to the overreaching of the harsh and greedy employer. The evils of the sweating system and of the long hours and low wages which are characteristic of it are well known. Now, I agree that it is a disputable question in the field of political economy how far a statutory requirement of maximum hours or minimum wages may be a useful remedy for these evils, and whether it may not make the case of the oppressed employee worse than it was before. But it is not the function of this Court to hold congressional acts invalid simply because they are passed to carry out economic views which the Court believes to be unwise or unsound.

"Legislatures which adopt a requirement of maximum hours or minimum wages may be presumed to believe that when sweating employers are prevented from paying unduly low wages by positive law they will continue their business, abating that part of their profits, which were wrung from the necessities of their employees, and will concede the better terms required by the law; and that while in individual cases hardship may result, the restriction will enure to the benefit of the general class of employees in whose interest the law is passed and so to that of the community at large.

"The right of the legislature under the Fifth and Fourteenth Amendments to limit the hours of employment on the score of the health of the employee, it

seems to me, has been firmly established. As to that, one would think, the line had been pricked out so that it has become a well formulated rule. In *Holden* v. *Hardy,* 169 U. S. 366, it was applied to miners and rested on the unfavorable environment of employment in mining and smelting. In *Lochner* v. *New York,* 198 U. S. 45, it was held that restricting those employed in bakeries to ten hours a day was an arbitrary and invalid interference with the liberty of contract secured by the Fourteenth Amendment. Then followed a number of cases beginning with *Muller* v. *Oregon,* 208 U. S. 412, sustaining the validity of a limit on maximum hours of labor for women to which I shall hereafter allude, and following these cases came *Bunting* v. *Oregon,* 243 U. S. 426. In that case, this Court sustained a law limiting the hours of labor of any person, whether man or woman, working in any mill, factory or manufacturing establishment to ten hours a day with a proviso as to further hours to which I shall hereafter advert. The law covered the whole field of industrial employment and certainly covered the case of persons employed in bakeries. Yet the opinion in the Bunting case does not mention the Lochner case. No one can suggest any constitutional distinction between employment in a bakery and one in any other kind of a manufacturing establishment which should make a limit of hours in the one invalid, and the same limit in the other permissible. It is impossible for me to reconcile the Bunting case and the Lochner case and I have always supposed that the Lochnerr case was thus overruled *sub silentio.* Yet the opinion of the Court herein in support of its conclusion quotes from the opinion in the Lochner case as one which has been sometimes distinguished but never overruled. Certainly there was no attempt to distinguish it in the Bunting case.

"However, the opinion herein does not overrule the Bunting case in express terms, and therefore I assume that the conclusion in this case rests on the distinction between a minimum of wages and a maximum

of hours in the limiting of liberty to contract. I regret to be at variance with the Court as to the substance of this distinction. In absolute freedom of contract the one term is as important as the other, for both enter equally into the consideration given and received, a restriction as to one is not any greater in essence than the other, and is of the same kind. One is the multiplier and the other the multiplicand.

"If it be said that long hours of labor have a more direct effect upon the health of the employee than the low wage, there is very respectable authority from close observers, disclosed in the record and in the literature on the subject quoted at length in the briefs, that they are equaly harmful in this regard. Congress took this view and we cannot say it was not warranted in so doing.

"With deference to the very able opinion of the Court and my brethren who concur in it, it appears to me to exaggerate the importance of the wage term of the contract of employment as more inviolate than its other terms. Its conclusion seems influenced by the fear that the concession of the power to impose a minimum wage must carry with it a concession of the power to fix a maximum wage. This, I submit, is a *non sequitur*. A line of distinction like the one under discussion in this case is, as the opinion elsewhere admits, a matter of degree and practical experience and not of pure logic. Certainly the wide difference between prescribing a minimum wage and a maximum wage could as a matter of degree and experience be easily affirmed.

"Moreover, there are decisions by this Court which have sustained legislative limitations in respect to the wage term in contracts of employment. In *McLean* v. *Arkansas*, 211 U. S. 539, it was held within legislative power to make it unlawful to estimate the graduated pay of miners by weight after screening the coal. In *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13, it was held that store orders issued for wages must be redeemable in cash. In *Patterson* v. *Bark Eudora*, 190

U. S. 169, a law forbidding the payment of wages in advance was held valid. A like case is *Strathearn S. S. Co.* v. *Dillon,* 252 U. S. 348. While these did not impose a minimum on wages, they did take away from the employee the freedom to agree as to how they should be fixed, in what medium they should be paid, and when they should be paid, all features that might affect the amount or the mode of enjoyment of them. The first two really rested on the advantage the employer had in dealing with the employee. The third was deemed a proper curtailment of a sailor's right of contract in his own interest because of his proneness to squander his wages in port before sailing. In *Bunting* v. *Oregon, supra,* employees in a mill, factory or manufacturing establishment were required if they worked over ten hours a day to accept for the three additional hours permitted not less than fifty per cent more than their usual wage. This was sustained as a mild penalty imposed on the employer to enforce the limitation as to hours; but it necessarily curtailed the employee's freedom to contract to work for the wages he saw fit to accept during those three hours. I do not feel, therefore, that either on the basis of reason, experience or authority, the boundary of the police power should be drawn to include maximum hours and exclude a minimum wage.

"Without, however, expressing an opinion that a minimum wage limitation can be enacted for adult men, it is enough to say that the case before us involves only the application of the minimum wage to women. If I am right in thinking that the legislature can find as much support in experience for the view that a sweating wage has as great and as direct a tendency to bring about an injury to the health and morals of workers, as for the view that long hours injure their health, then I respectfully submit that *Muller* v. *Oregon,* 208 U. S. 412, controls this case. The law which was there sustained forbade the employment of any female in any mechanical establishment or factory or laundry for more than ten hours. This cov-

ered a pretty wide field in women's work and it would not seem that any sound distinction between that case and this can be built up on the fact that the law before us applies to all occupations of women with power in the board to make certain exceptions. Mr. Justice Brewer, who spoke for the Court in *Muller* v. *Oregon*, based its conclusion on the natural limit to women's physical strength and the likelihood that long hours would therefore injure her health, and we have had since a series of cases which may be said to have established a rule of decision. *Riley* v. *Massachusetts*, 232 U. S. 671; *Miller* v. *Wilson*, 236 U. S. 373; Bosley v. *McLaughlin*, 236 U. S. 385. The cases covered restrictions in wide and varying fields of employment and in the later cases it will be found that the objection to the particular law was based not on the ground that it had general application but because it left out some employments.

"I am not sure from a reading of the opinion whether the Court thinks the authority of *Muller* v. *Oregon* is shaken by the adoption of the Nineteenth Amendment. The Nineteenth Amendment did not change the physical strength or limitations of women upon which the decision in *Muller* v. *Oregon* rests. The amendment did give women political power and makes more certain that legislative provisions for their protection will be in accord with their interests as they see them. But I don't think we are warranted in varying constitutional construction based on physical differences between men and women, because of the Amendment.

"But for my inability to agree with some general observations in the forcible opinion of Mr. Justice Holmes who follows me, I should be silent and merely record my concurrence in what he says. It is perhaps wiser for me, however, in a case of this importance, separately to give my reasons for dissenting."

Mr. Justice Holmes' dissenting opinion reads, in part as follows:

> "The question in this case is the broad one, Whether Congress can establish minimum rates of wages for women in the District of Columbia with due provision for special circumstances, or whether we must say that Congress has no power to meddle with the matter at all. To me, notwithstanding the deference due to the prevailing judgment of the Court, the power of Congress seems absolutely free from doubt. The end, to remove conditions leading to ill health, immorality and the deterioration of the race, no one would deny to be within the scope of constitutional legislation. The means are means that have the approval of Congress, of many States, and of those governments from which we have learned our greatest lessons. When so many intelligent persons, who have studied the matter more than any of us can, have thought that the means are effective and are worth the price, it seems to me impossible to deny that the belief reasonably may be held by reasonable men. If the law encountered no other objection than that the means bore no relation to the end or that they cost too much I do not suppose that anyone would venture to say that it was bad. I agree, of course, that a law answering the foregoing requirements might be invalidated by specific provisions of the Constitution. For instance it might take private property without just compensation. But in the present instance the only objection that can be urged is found within the vague contours of the Fifth Amendment, prohibiting the depriving any person of liberty or property without due process of law. To that I turn.
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> "The earlier decisions upon the same words in the Fourteenth Amendment began within our memory and went no farther than an unpretentions assertion of the liberty to follow the ordinary callings. Later that innocuous generality was expanded into the dogma, Liberty of Contract. Contract is not specially mentioned in the text that we have to construe. It is

merely an example of doing what you want to do, embodied in the word liberty. But pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts. Without enumerating all the restrictive laws that have been upheld I will mention a few that seem to me to have interfered with liberty of contract quite as seriously and directly as the one before us. Usury laws prohibit contracts by which a man receives more than so much interest for the money that he lends. Statutes of frauds restrict many contracts to certain forms. Some Sunday laws prohibit practically all contracts during one-seventh of our whole life. Insurance rates may be regulated. *German Alliance Insurance Co.* v. *Lewis,* 233 U. S. 389. (I concurred in that decision without regard to the public interest with which insurance was said to be clothed. It seemed to me that the principle was general.) Contracts may be forced upon the companies. *National Union Fire Insurance Co.* v. *Wanberg,* 260 U. S. 71. Employers of miners may be required to pay for coal by weight before screening. *McLean* v. *Arkansas,* 211 U. S. 539. Employers generally may be required to redeem in cash store orders accepted by their employees in payment. *Knoxville Iron Co.* v. *Harbison,* 183 U. S. 13. Payment of sailors in advance may be forbidden. *Patterson* v. *Bark Eudora,* 190 U. S. 169. The size of a loaf of bread may be established. *Schmidinger* v. *Chicago,* 226 U. S. 578. The responsibility of employers to their employees may be profoundly modified. *New York Central R. R. Co.* v. *White,* 243 U. S. 188. *Arizona Employers Liability Cases,* 250 U. S. 400. Finally women's hours of labor may be fixed; *Muller* v. *Oregon,* 208 U. S. 412; *Riley* v. *Massachusetts,* 232 U. S. 671, 679; *Hawley* v. *Walker,* 232 U. S. 718; *Miller* v. *Wilson,* 236 U. S. 373; *Bosley* v. *McLaughlin,* 236 U. S. 385; and the principle was extended to men with the allowance of a limited overtime to be paid for 'at the rate of time and one-half of the regular wage,' in *Bunting* v. *Oregon,* 243 U. S. 426.

"I confess that I do not understand the principle on which the power to fix a minimum for the wages of women can be denied by those who admit the power to fix a maximum for their hours of work. I fully assent to the proposition that here as elsewhere the distinctions of the law are distinctions of degree, but I perceive no difference in the kind or degree of interference with liberty, the only matter with which we have any concern, between the one case and the other. The bargain is equally affected whichever half you regulate. *Muller* v. *Oregon*, I take it, is as good law today as it was in 1908. It will need more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot take these differences into account. I should not hesitate to take them into account if I thought it necessary to sustain this act. *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 63. But after *Bunting* v. *Oregon*, 243 U. S. 426, I had supposed that it was not necessary, and that *Lochner* v. *New York*, 198 U. S. 45, would be allowed a deserved repose.

"This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirement of health and right living. It is safe to assume that women will not be employed at even the lowest wages allowed unless they earn them, or unless the employer's business can sustain the burden. In short the law in its character and operation is like hundreds of so-called police laws that have been upheld."

Respondent insists that the foregoing decision of the United States supreme court is controlling, and that the judgment should be affirmed. Let us bear in mind that *Adkins* v. *Children's Hospital*, 261 U. S. 525, 43 S. Ct. 394, 24 A. L. R. 1238, was based upon an act of Congress passed for the District of Columbia.

In *O'Gorman & Young* v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 51 S. Ct. 130, 72 A. L. R. 1163, the United States Supreme Court held that the business of insurance is so

far affected with the public interest that the state may regulate the rates and likewise the relations of those engaged in business; that a state statute dealing with a subject clearly within the police power cannot be declared void upon the ground that the specific method of regulation prescribed by it is unreasonable, in the absence of any factual foundation in the record to overcome the presumption of constitutionality. The court said:

> "The statute here questioned deals with a subject clearly within the scope of the police power. We are asked to declare it void on the ground that the specific method of regulation prescribed is unreasonable and hence deprives the plaintiff of due process of law. As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. It does not appear upon the face of the statute, or from any facts of which the court must take judicial notice, that in New Jersey evils did not exist in the business of fire insurance for which this statutory provision was an appropriate remedy. The action of the legislature and of the highest court of the state indicates that such evils did exist. The record is barren of any allegation of fact tending to show unreasonableness."

That the powers not delegated to the United States by the constitution nor prohibited by it to the states are reserved to the states, needs no citation of sustaining authority. The police power of a state was not given to the Federal government nor prohibited by the constitution to the people of the respective states, hence it is one of the reserved powers. It is true that the employer and the employee are deprived to a certain extent of their liberty to contract by the minimum wage law. However, if the deprivation is with due process, if it corrects a known and stated public evil, if it promotes the public welfare—that is, if it is a reasonable exercise of the police power—it is constitutional and it is a proper exercise of legislative power.

In *Nebbia* v. *New York*, 291 U. S. 502, 54 S. Ct. 505, 89 A. L. R. 1469, it was held that one may be compelled to pay a greater sum than that which may be asked because at another end of the industrial scale is found one who may not be paid what his product is worth and who may be unable to bargain freely with those who possess the marketing facilities. The court said:

> "The law-making bodies have in the past endeavored to promote free competition by laws aimed at trusts and monopolies. The consequent interference with private property and freedom of contract has not availed with the courts to set these enactments aside as denying due process. Where the public interest was deemed to require the fixing of minimum prices, that expedient has been sustained. If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."

The legal duty placed upon the employer by our minimum wage law is that he must pay women in his employ in wages a sum found to be necessary for the maintenance of the health as well as the morals of the employee. If the wages paid equal or are in excess of the cost of the maintenance of a normal health standard, the state's concern in the matter ceases. If the employer pays less than the amount found to be the minimum cost of the maintenance of the normal health standard by virtue of his more secure and powerful economic position, the transaction savors of exploitation.

Restraints upon the liberty to contract have been declared constitutional in many cases, as cited in the dissenting opinion of Mr. Justice Holmes in *Adkins* v. *Children's Hospital,* 261 U. S. 525, 43 S. Ct. 394, 24 A. L. R. 1238. The underlying principle in all such cases is the state's right, the state's duty, to interfere in the terms of a contract between private parties when there is an inequality in bargaining power.

> "And therefore I take it to be an established rule, that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged, and the conveyance absolute. And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them." *Vernon* v. *Bethell,* 2 Eden's Chancery Reports 68.

The mere fact that the parties are of full age does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to a contract shall be protected against himself.

> "The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality,

and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employes, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases, self-interest is often an unsafe guide, and the legislature may properly interpose its authority.

"It may not be improper to suggest in this connection that although the prosecution in this case was against the employer of labor who apparently under the statute is the only one liable, his defence is not so much that his right to contract has been infringed upon, but that the act works a peculiar hardship to his employes, whose right to labor as long as they please is alleged to be thereby violated. The argument would certainly come with better grace and greater cogency from the latter class. But the fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. 'The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the state must suffer.' " *Holden* v. *Hardy,* 169 U. S. 366, 18 S. Ct. 383.

We held in *Larsen* v. *Rice,* 100 Wash. 642, 171 Pac. 1037, that the controversy there, which differs in no important particular from the controversy here, had an added element not found in the ordinary controversy by the individual. It was not wholly a private concern. It was affected with a public interest, the state having declared the minimum wage of a certain amount to be necessary. Therefore, the

state has an interest in the way that the fixed compensation is actually paid. The statute is protective of the public as well as the wage earner.

If the state legislature and state supreme court find that the statute is of a public interest, the supreme court of the United States will accept such judgment in the absence of facts to support the contrary conclusion. Unless the supreme court of the United States can find beyond question that chapter 174, Laws of 1913, p. 602, Rem. Rev. Stat., Sec. 7623 (P. C. Sec. 3256), et seq., is a plain, palpable invasion of rights secured by the fundamental law and has no real or substantial relation to the public morals or public welfare, then the law must be sustained. The United States supreme court has not yet held that a state statute such as the one in the case at bar is unconstitutional, and until such time—*Adkins* v. *Children's Hospital,* 261 U. S. 525, 43 S. Ct. 394, 24 A. L. R. 1238, is not controlling—we shall adhere to our holding in the case of *Larsen* v. *Rice,* 100 Wash. 642, 171 Pac. 1037; and *Spokane Hotel Co.* v. *Younger,* 113 Wash. 359, 194 Pac. 595. It does not appear upon the face of the minimum wage law or from any facts of which the supreme court of the United States must take judicial notice that, in the state of Washington, evils did not exist for which our minimum wage law was an appropriate remedy. The action of the state legislature and of this court indicates that such evils do exist.

The judgment is reversed, and the cause remanded with instructions to the trial court to enter judgment in favor of the appellant in an amount equal to the difference between the amount paid and the amount due under the minimum wage law.

Holcomb, Main, Blake, and Beals, JJ., concur.